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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 WAHOO INTERNATIONAL, INC,
11 Plaintiff,
12 vs.
13 PHIX DOCTOR, INC., a Florida
14 Corporation; and DOES 1-10,
15 Defendants.

CASE NO. 13cv1395-GPC(BLM)

**ORDER GRANTING
COUNTERDEFENDANTS'
MOTION TO DISMISS AMENDED
COUNTERCLAIM**

[Dkt. No. 107.]

16 PHIX DOCTOR, INC., a Florida
17 Corporation and ANTHONY
18 GOWER, an individual,
19 Counter-Plaintiffs

20 vs.

21 WAHOO INTERNATIONAL, INC., a
22 California Corporation; GARY
23 FISHER, an individual; MARK
24 CAPP, an individual; and STAY
25 COVERED, INC., and DOES 1-10,
26 Counter-Defendants

27 Before the Court is Counterdefendants Wahoo International, Inc. ("Wahoo") and
28 Gary Fisher's ("Fisher") motion to dismiss amended counterclaim pursuant to Federal
Rule of Civil Procedure ("Rule") 12(b)(6). (Dkt. No. 107.) On May 15, 2015,
Counterdefendants Mark Cappa and Stay Covered, Inc.'s ("Stay Covered") filed a

1 notice of joinder to Wahoo and Fisher's motion to dismiss. (Dkt. No. 111.) On May
 2 29, 2015, Counterclaimants Phix Doctor, Inc. and Anthony Gowen filed an opposition.
 3 (Dkt. No. 116.) Counterdefendants filed their replies. (Dkt. Nos. 117, 118.) Based
 4 on the reasoning below, the Court GRANTS Counterdefendants' motion to dismiss the
 5 amended counterclaim without leave to amend.

6 **Procedural Background**

7 On December 19, 2014, Defendants and Counterclaimants Phix Doctor, Inc.
 8 ("Phix Doctor") and Anthony Gowen ("Gowen") filed a counterclaim against Plaintiff
 9 and Counterdefendants Wahoo International, Inc., ("Wahoo"), Gary Fisher ("Fisher"),
 10 and Mark Cappa ("Cappa") for antitrust violations pursuant to 15 U.S.C. § 2, and wire
 11 fraud pursuant to the Racketeer Influenced and Corrupt Organization Act ("RICO")
 12 statute, 18 U.S.C. § 1343. (Dkt. No. 81 at 11.)

13 On February 19, 2015, the Court granted Counterdefendants' motion to dismiss
 14 with leave to amend. (Dkt. No. 101.) The Court concluded that the counterclaim failed
 15 to allege a claim under the Sherman Act and wire fraud under RICO. (*Id.*) On March
 16 6, 2015, Counterclaimants filed an amended counterclaim against Wahoo and Fisher,
 17 and a third party complaint¹ against Stay Covered Inc. and its principal agent, Mark
 18 Cappa and added ten additional causes of action as to all Counterdefendants. (Dkt. No.
 19 102.)

20 On May 1, 2015, Counterdefendants Fisher and Wahoo filed a motion to dismiss
 21 the amended counterclaim. (Dkt. No. 107.) On May 15, 2015, Mark Cappa and Stay
 22 Covered filed a notice of joinder in the motion. (Dkt. No. 111.) On May 29, 2015,
 23 Counterclaimants filed an opposition. (Dkt. No. 116.) On June 5, 2015,
 24 Counterdefendants filed their replies. (Dkt. Nos. 117, 118.)

25
 26 ¹Phix Doctor and Gowen assert a counterclaim against Wahoo, Fisher, Cappa
 27 and Stay Covered. However, a counterclaim cannot be brought against a non-party.
 28 See Fed. R. Civ. P. 13. The claims against Cappa and Stay Covered should be called
 a third party complaint. However, "this is a distinction without a difference for the
 purposes" of this order. See *Mortgages, Inc. v. U.S. Dist. Court for Dist. of Nev.*, 934
 F.2d 209, 211 (9th Cir. 1991).

Factual Background

Phix Doctor is a Florida corporation which sells resin for surfboards and other water related product repair. (Dkt. No. 102, Counterclaim ¶ 2.) Until August 2014, Phix Doctor was using the mark “Dura-Rezn” and prior to that “Dura-Rez.” (Id.) Gowen is the President and main shareholder of Phix Doctor. (Id. ¶ 3.) Wahoo is a California corporation and a competitor in the resin industry with Phix Doctor. (Id. ¶ 4.) It conducts business in California and Florida. (Id.) Counterdefendant Fisher is the President of Wahoo. (Id. ¶ 5.) Mark Cappa is an agent of Phix Doctor and directly interfered with Phix Doctor’s business relations. (Id. ¶ 6.) Stay Covered, Inc. is a California corporation which also contracts with Wahoo, and Cappa is its principal agent. (Id. ¶ 7.)

According to the amended counterclaim, the term “rez” has been trademarked in the resin industry since before the 1950s.² (Id. ¶ 10.) The term “rez” is a common and generic term for “resin.” (Id.) In the 1980s, Sunrez was selling resin products to Wahoo and has overlapping business with Wahoo. (Id. ¶ 11.) One of Wahoo’s product is a resin produced for repairing damage to fiberglass frames such as boats, surfboards, and pools. (Id. ¶ 12.) Wahoo trademarked “SOLAREZ” for its resin repair product and directly targets Florida and the rest of the country. (Id.) Phix Doctor also produced resin under the trademark name “Dura Rez” and was sued in the instant lawsuit for infringing “SOLAREZ.” (Id. ¶ 13.) Wahoo claims it has a trademark on the suffix “rez” but it only has three registered trademarks, “Wahoo”, “Bullyboard” and “SOLAREZ.” (Id.) Moreover, there are other companies that also manufacture resin with the “rez” suffix which predate Wahoo’s trademark. (Id.)

As Phix Doctor obtained more market share, Wahoo took notice and decided to hurt competition and its competitor. (Id. ¶ 14.) In December 2012, Wahoo directed its attorneys to send a cease and desist letter to Phix Doctor claiming it had ownership of

²Phix Doctor states it attached, as Exhibit A, the various trademarks using “rez”; however, there are no attachments to the amended counterclaim.

1 a family of marks, “rez”, and that “Dura-Rez” was infringing its mark. (Id. ¶ 15.)

2 After discussions with Gary Fisher, he agreed that “Dura-Rezn” was an
3 acceptable change to the mark to satisfy its claim of infringement. (Id. ¶ 16.) Phix
4 Doctor relied on the agreement and statements from Fisher and spent significant
5 resources to change its mark and branding. (Id. ¶¶ 16, 17.) The communications with
6 Fisher were done via interstate channels of communications and/or U.S. mail. (Id. ¶
7 16.) Fisher falsely represented that he would not pursue the infringement action when
8 it made the representations to Phix Doctor regarding “Dura-Rezn.” (Id. ¶ 17.) After
9 Phix Doctor agreed to change its mark to “Dura-Rezn”, Wahoo still insisted that its
10 mark was being infringed upon. (Id. ¶ 18.)

11 Wahoo filed this case alleging trademark infringement, trademark dilution and
12 other state law claims against Phix Doctor in June 2013 when it knew it had no
13 reasonable belief in the allegations in the complaint or any reasonable belief “rez” was
14 owned by Wahoo. (Id. ¶ 20.) The amended counterclaim alleges that Wahoo is a
15 “trademark troll” by falsely claiming to have an exclusive right to the mark “rez” and
16 bringing sham litigation against other competitors and attempting to extract a quick
17 settlement and to hurt competition. (Id. ¶¶ 20-22.) Wahoo has used its position as the
18 more established and senior producer of resin to prevent new competition from entering
19 the market or thwarting new competition. (Id. ¶ 23.)

20 Moreover, since at least 2010, Wahoo was not using proper shipping labels as
21 required when shipping hazardous material via U.S. mail. (Id. ¶ 24.) As a result,
22 Wahoo paid less in shipping costs which gave it a competitive advantage in shipping
23 resin products over its competitors that were properly labeling its products. (Id.)
24 Furthermore, Wahoo is attempting to harm its competitor by filing this lawsuit,
25 attempting to monopolize the mark, “rez”, and harm Phix Doctor by having it expend
26 money on legal fees. (Id. ¶ 25.) Counterclaimants assert that Wahoo’s sham litigation
27 and improper shipping allows it an anti-competitive advantage over competitors and
28 impedes innovation. (Id. ¶ 27.)

1 Wahoo engaged in anti-competitive tactics when it, in July 2014, under the
2 direction of Fisher, began sending cease and desist letters to distributors and retailers
3 of Phix Doctor via interstate channels of communication such as facsimile, emails and
4 letters that contained false allegations regarding its ownership of the “rez” trademark.
5 (Id. ¶ 28.) Counterdefendants knew the letters were false, baseless and intended to
6 disrupt the business relationships of Phix Doctor. (Id. ¶ 34.) When Phix Doctor
7 informed Wahoo that it sold its rights to “Dura Rez” and “Dura-Rezn” to Sunrez, Inc.,
8 Wahoo has taken no steps to assert its trademark on Sunrez because its goal was
9 directed at smaller competitors, such as Phix Doctor. (Id. ¶ 30.)

10 Phix Doctor³ also believes that false information, through cease and desist letters,
11 regarding ownership of the trademark was communicated to third party relationships of
12 Phix Doctor but Wahoo did not intend to pursue litigation with the third parties. (Id.
13 ¶ 31.) Wahoo intended to defraud third parties to end their business relationships with
14 Phix Doctor. (Id. ¶ 32.) As a result, various independent sales agents of Phix Doctor
15 and Wahoo were induced to stop selling Phix Doctor’s products or sell more Wahoo’s
16 resin products. (Id. ¶ 33.)

17 In July 2014, Mark Cappa, an officer of Stay Covered, and one of Phix Doctor’s
18 representatives, told customers and distributors of Phix Doctor that they faced liability
19 for selling its products. (Id. ¶ 35.) Cappa knew or was negligent in knowing the
20 allegations were false. (Id.) Cappa was informed of the false information and instructed
21 to participate in Wahoo’s scheme and believed his company would profit by continuing
22 to disseminate false information to its customers, which bought products from Wahoo
23 and Phix Doctor. (Id. ¶ 37.) Counterdefendants were aware of the contractual and
24 business relationship when they interfered and knowingly or falsely claims these third
25 parties faced liability if they bought or sold Phix Doctor’s products. (Id. ¶ 38.) As a
26 result, various retailers and distributors refused to buy Phix Doctor’s products due to
27

28 ³While the allegation states “Wahoo”, it appears that Counterclaimants are
asserting Phix Doctor’s belief. (Dkt. No. 102, Am. Counterclaim ¶ 31.)

1 threats and false statements. (*Id.* ¶ 39.) Phix Doctor was coerced into changing its
 2 trademark from “Dura-Rezn” to “Dura-Resin” to calm the fears of its customers. (*Id.*
 3 ¶ 39.)

4 Counterclaimants allege the following causes of action: (1) antitrust/Sherman Act
 5 § 2; (2) wire fraud under 18 U.S.C. § 1343; (3) mail fraud under 18 U.S.C. § 1341; (4)
 6 RICO under 18 U.S.C. § 1961 *et seq.*; (5) unfair business practices pursuant to
 7 California Business and Profession code sections 17200 *et seq.*; (6)&(7)⁴ intentional
 8 interference with contractual relations under California and Florida law; (8) intentional
 9 interference with prospective economic relations under California and Florida law; (9)
 10 negligent interference with prospective economic advantage under California and
 11 Florida law; (10) defamation under Florida law; (11) fraud under Florida law; and (12)
 12 deceptive and unfair practices act under Florida law. (Dkt. No. 102 at 17-24.)

13 **A. Legal Standard on Federal Rule of Civil Procedure 12(b)(6)**

14 Federal Rule of Civil Procedure 12(b)(6) (“Rule”) permits dismissal for “failure
 15 to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal
 16 under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory
 17 or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*
 18 *Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990). Under Federal Rule of Civil Procedure
 19 8(a)(2), the plaintiff is required only to set forth a “short and plain statement of the
 20 claim showing that the pleader is entitled to relief,” and “give the defendant fair notice
 21 of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v.*
 22 *Twombly*, 550 U.S. 544, 555 (2007).

23 A complaint may survive a motion to dismiss only if, taking all well-pleaded
 24 factual allegations as true, it contains enough facts to “state a claim to relief that is
 25 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
 26 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
 27 content that allows the court to draw the reasonable inference that the defendant is liable

28 ⁴(6) and (7) are the same causes of action.

1 for the misconduct alleged.” Id. “Threadbare recitals of the elements of a cause of
 2 action, supported by mere conclusory statements, do not suffice.” Id. “In sum, for a
 3 complaint to survive a motion to dismiss, the non-conclusory factual content, and
 4 reasonable inferences from that content, must be plausibly suggestive of a claim
 5 entitling the plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir.
 6 2009) (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as
 7 true all facts alleged in the complaint, and draws all reasonable inferences in favor of
 8 the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

9 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless
 10 the court determines that the allegation of other facts consistent with the challenged
 11 pleading could not possibly cure the deficiency.’” DeSoto v. Yellow Freight Sys., Inc.,
 12 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well
 13 Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to
 14 amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at
 15 658; Schreiber, 806 F.2d at 1401.

16 **B. Legal Standard Under Federal Rule of Civil Procedure 9(b)**

17 Federal Rule of Civil Procedure 9(b) provides that “[i]n alleging fraud . . . , a
 18 party must state with particularity the circumstances constituting fraud,” while
 19 “[m]alice, intent, knowledge, and other conditions of a person’s mind may be averred
 20 generally.” Fed. R. Civ. P. 9(b). “Rule 9(b) demands that the circumstances
 21 constituting the alleged fraud be specific enough to give defendants notice of the
 22 particular misconduct . . . so that they can defend against the charge and not just deny
 23 that they have done anything wrong.” Kearns v. Ford Motor Co., 567 F.3d 1120, 1124
 24 (9th Cir. 2009) (internal quotation marks omitted). “Any averments which do not meet
 25 that standard should be ‘disregarded,’ or ‘stripped’ from the claim for failure to satisfy
 26 Rule 9(b).” Id. Accordingly, “[t]o avoid dismissal for inadequacy under Rule 9(b),
 27 [the] complaint would need to state the time, place, and specific content of the false
 28 representations as well as the identities of the parties to the misrepresentation.”

1 Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004) (internal quotation
2 marks omitted).

3 **C. Sherman Act, 15 U.S.C. § 2**

4 Counterdefendants first argue that Counterclaimants have failed to correct the
5 deficiency noted by the Court in the prior complaint by failing to allege that Wahoo
6 possesses monopoly power in the relevant market. In the Court’s previous order on the
7 motion to dismiss the counterclaim, the Court held that “Phix Doctor failed to allege
8 that Wahoo possessed monopoly power in the relevant market, which is one of the
9 elements to state a monopolization claim under Section 2 of the Sherman Act. The
10 relevant market is key to determining whether competition in the relevant product
11 market has been negatively affected.” (Dkt. No. 101 at 6.) Counterclaimants do not
12 address this argument in their opposition. Instead, they state the elements of a claim of
13 attempt to monopolize, which appear to not require the assertion of monopoly power in
14 the relevant market.⁵ (Dkt. No. 116 at 4.)

15 Section 2 of the Sherman Act makes it illegal to “monopolize, or attempt to
16 monopolize, or combine or conspire with any other person or persons, to monopolize
17 any part of the trade or commerce among the several States, or with foreign nations . .
18 . .” 15 U.S.C. § 2. To state a monopolization claim under § 2 of the Sherman Act, a
19 plaintiff must sufficiently allege that a defendant “(1) possessed monopoly power in the
20 relevant market, (2) wilfully acquired or maintained that power through exclusionary
21 conduct and (3) caused antitrust injury.” MetroNet Servs. Corp. v. Qwest Corp., 383
22 F.3d 1124, 1130 (9th Cir. 2004).

23 To demonstrate attempted monopolization a plaintiff must prove “(1) that the
24 defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent
25 to monopolize and (3) a dangerous probability of achieving monopoly power.” Cascade
26 Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008) (citing Spectrum

27
28 ⁵Based on their argument, it appears Counterclaimants are only asserting an
attempt to monopolize cause of action, not monopolization.

1 Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (internal quotations omitted)).
 2 However, in order to demonstrate probability of achieving monopoly power there must
 3 be a showing of the “relevant product and geographic markets and the defendant’s
 4 economic power in that market.” Spectrum Sports, Inc., 506 U.S. at 459.

5 While “defendant’s power in the relevant market is not listed as an essential
 6 element of an attempt claim, such proof is relevant and often critical.” Thurman Indus.,
 7 Inc. v. Pay ‘N Pak Stores, Inc., 875 F.2d 1369, 1378 (9th Cir. 1989); M.A.P. Oil Co.,
 8 Inc. v. Texaco, Inc., 691 F.2d 1303, 1309 (9th Cir. 1982) (“failure to define the relevant
 9 market was fatal to plaintiffs’ attempt claim.”); Verizon Commc’ns Inc. v. Law Offices
 10 of Curtis v. Trinko, LLP, 540 U.S. 398, 407 (2004) (the offense of monopolization or
 11 attempt to monopolize requires possession of monopoly power in the relevant market);
 12 InfoStream Group, Inc. v. PayPal, Inc., No. C 12–748 SI, 2012 WL 3731517 (N.D. Cal.
 13 Aug. 28, 2012) (“Plaintiffs have wholly failed to allege any specific facts with respect
 14 to the market power of their competitors, despite the fact that “demonstrating the
 15 dangerous probability of monopolization in an attempt case [] requires inquiry into the
 16 relevant product and geographic market and the defendant’s economic power in that
 17 market.”)

18 Monopoly power is “the power to control prices or exclude competition.” United
 19 States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (quoting United States v. E.I. du Pont
 20 de Nemours & Co., 351 U.S. 377, 391 (1956)). Under § 2, monopoly claims require a
 21 showing of monopoly power which is also commonly referred to as market power. See
 22 Cost Management Services, 99 F.3d 937, 950 n. 15 (1996) (“The terms ‘market power’
 23 and ‘monopoly power’ are used interchangeably herein.”).

24 Relevant market is determined by a “relevant product market and a relevant
 25 geographic market.” Los Angeles Mem’l Coliseum Comm’n v. NFL, 726 F.2d 1381,
 26 1392 (9th Cir. 1984). Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 42–
 27 43 (2006). “The relevant product market identifies the products or services that
 28 compete with each other, and the relevant geographic market identifies the area where

1 the competition in the relevant product market takes place.” Sidibe v. Health, 51 F.
2 Supp. 3d 870, 883 (N.D. Cal. 2014) (citing Los Angeles Mem’l Coliseum Comm’n, 726
3 F.2d at 1392).

4 While Counterclaimants assert Counterdefendants succeeded in their attempt to
5 grow its monopoly power over the “resin, fiberglass, and particularly surfboard repair
6 market”, (Dkt. No. 102, Am Counterclaim ¶ 48), and generally assert that Wahoo is the
7 “more established and senior producer of resin” such conclusory allegations without
8 supporting facts are not sufficient to state a claim for attempted monopolization.
9 Counterclaimants do not assert that Counterdefendants possessed monopoly power in
10 the relevant market. In fact, the assertions are contradictory. As Wahoo points out, the
11 amended counterclaim alleges that “[b]oth Wahoo and Phix Doctor are relatively small
12 resin producers and competitors” which does not support monopoly power. (Dkt. No.
13 102, Am. Counterclaim ¶ 14.) While Counterclaimants assert that Wahoo attempted to
14 gain market share, there is no assertion of market power. (Id. ¶ 33.) Moreover, they
15 allege that Wahoo took no steps to assert its monopoly power over Sunrez and did not
16 pursue litigation with third parties for selling allegedly infringing products. (Id. ¶¶ 30,
17 31.) These facts do not demonstrate anti-competitive conduct. Thus, the Court
18 concludes that the amended counterclaim fails to state a claim for attempted
19 monopolization under § 2 of the Sherman Act. Based on Counterclaimant’s failure to
20 allege monopoly power in the relevant market, the Court need not address
21 Counterdefendants’ other arguments.

22 Counterdefendants seek dismissal with prejudice because Counterclaimants may
23 not amend the complaint to remove the allegation that Wahoo is a “relatively small resin
24 producers” in order to allow amendment. A complaint can be amended to cure
25 deficiencies in the complaint but it must be consistent with the challenge pleading and
26 must not contradict the allegations in the original complaint. See Johnson v. Lucent
27 Techs, Inc., 653 F.3d 1000, 1012 (9th Cir. 2011) (citing Reddy v. Litton Indus., Inc.,
28 912 F.2d 291, 296-97 (9th Cir. 1990) (amended complaint may only allege “other facts

consistent with the challenged pleading.”). Here, since the amended counterclaim already alleges that Wahoo is a relatively small resin producer, it cannot allege a claim for attempted monopolization. Thus, the Court GRANTS Counterdefendants’ motion to dismiss on the § 2 Sherman Act cause of action with prejudice.

D. Wire Fraud, 18 U.S.C. § 1343, and Mail Fraud, 18 U.S.C. § 1341

In the amended counterclaim, Counterclaimants assert the predicate act of mail and wire fraud, 18 U.S.C. §§ 1341, 1343. The mail and wire fraud statutes contain three elements: (A) the formation of a scheme to defraud, (B) the use of the mails or wires in furtherance of that scheme, and (C) the specific intent to defraud. Ecletic Props. East, LLC v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014) (citing Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1399 (9th Cir. 1986)). Rule 9(b) applies to wire and mail fraud. Odom v. Microsoft Corp., 486 F.3d 541, 554 (9th Cir. 2007) “The only aspects of wire [or mail] fraud that require particularized allegations are the factual circumstances of the fraud itself.” Id. (the formation of a scheme to defraud, and specific intent to defraud requires a showing of the defendants’ states of mind so general allegations are sufficient).

Wahoo alleges that Phix Doctor has not changed its allegations which the Court previously found insufficient because it did not allege the time, place and parties involved. (Dkt. No. 101 at 11.) In opposition, Phix Doctor alleges that Wahoo’s mailing of documents containing knowingly false statement is sufficient to establish mail fraud. (Dkt. No. 116 at 7.) The false statements made by Wahoo are that “rez’ was protected, “Dura-Rez” was infringed, Wahoo would accept a modification of “Dura-Rezn” and third parties were liable for infringement or potentially liable. (Id. at 9.) Phix Doctor further contends that Wahoo’s conduct with representatives and attorneys to threaten Phix Doctor with false statement and statements made to its customers are actionable. (Id.)

First, Wahoo alleges that the allegation that “Fisher agreed that ‘Dura-Rezn’ was an acceptable change to the mark to satisfy its frivolous claim of infringement” and

1 “falsely represented it would not pursue this anticompetitive infringement action when
2 it made the representation to Phix Doctor regarding Dura-Rezn” was not amended and
3 cannot state a claim. (Dkt. No. 102, Am. Counterclaim ¶¶ 16, 17.) The Court
4 previously concluded that Phix Doctor “failed to allege the time, place and the parties
5 involved concerning the alleged discussion.” While Phix Doctor amended the claim by
6 adding “US mail” which was omitted from the original counterclaim, the remaining
7 claim as to the facts has not changed. Therefore, Phix Doctor has still failed to allege
8 the time, place and the parties involved concerning the alleged discussion.⁶
9 Accordingly, this allegation fails to comply with Rule 9(b).

10 Second, Wahoo contends that the allegation as to Mark Cappa, in July 2014,
11 when he allegedly told customers and distributors of Phix Doctor that they faced
12 liability for selling its products and he knew or was negligent in knowing the allegations
13 were false, also was not amended and does not sufficiently plead wire and mail fraud
14 under Rule 9(b). (*Id.* ¶ 35.) Despite the Court’s prior ruling and reason why the Court
15 granted the motion to dismiss, the amended counterclaim fails to amend this assertion
16 by alleging which customers and distributors of Phix Doctor received such
17 communication and the method of communication. Therefore, this assertion again fails
18 to comply with Rule 9(b).

19 Next, Phix Doctor also asserts that under the direction of Fisher, Wahoo began
20 sending cease and desist letters via facsimile, emails and letters by U.S. mail to Phix
21 Doctor’s distributors and retailers in July 2014 that contained knowingly false allegation
22 as to the trademark ownership. (*Id.* ¶ 28.) This allegation does not comply with Rule
23 9(b) because it does not state the place and identities of the parties to the
24 misrepresentation. *See Edwards*, 356 F.3d at 1066 (complaint “would need to state the
25 time, place, and specific content of the false representations as well as the identities of
26

27 ⁶Wahoo argues this statement is barred by the litigation privilege pursuant to
28 California Civil Code section 47. However, due to the failure of Phix Doctor to state
a claim under RICO, the Court concludes that it need not address Wahoo’s argument.

1 the parties to the misrepresentation.”)

2 Lastly, Phix Doctor maintains that Phix Doctor also sent communication to third
3 party relationships of various independent sale agents of Phix Doctor. (Id. ¶¶ 31, 32.)
4 The allegation fails to allege the use of wire or mail, and does not allege the time, and
5 the identities of the parties. Therefore, it does not have the requisite specificity required
6 by Rule 9(b) to allege a fraud. See Edwards, 356 F.3d at 1066.

7 In sum, the Court concludes that the amended counterclaim fails to allege a claim
8 for wire and mail fraud, and the Court GRANTS counterdefendants’ motion to dismiss
9 these causes of action.

10 **E. RICO**

11 The elements of a RICO cause of action requires that a defendant “must
12 participate in (1) the conduct of (2) an enterprise that affects interstate commerce (3)
13 through a pattern (4) of racketeering activity or collection of unlawful debt.” Eclectic
14 Props., East, LLC v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014); see
15 18 U.S.C. § 1962(c). A “pattern of racketeering activity” requires at least two predicate
16 acts. Clark v. Time Warner Cable, 523 F.3d 1110, 1116 (9th Cir. 2008); see 18 U.S.C.
17 § 1961(5). The amended counterclaim asserts two predicate acts of wire fraud and
18 mail fraud, 18 U.S.C. §§ 1341, 1343. Since Counterclaimants failed to properly allege
19 the predicate acts of mail and wire fraud, the amended counterclaim fails to state a claim
20 for relief under RICO. See Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir.
21 2004) (because plaintiff failed to properly allege predicate acts of mail or wire fraud,
22 the complaint does not state any claim for relief under RICO).

23 **F. UCL Claim**

24 Counterdefendants argue that this claim should be dismissed. Counterclaimants
25 assert that their UCL claim is based on the “unlawful” prong of the UCL and
26 sufficiently allege a cause of action. (Dkt. No. 116 at 11.)

27 The UCL prohibits “any unlawful, unfair or fraudulent business act or practice.”
28 Cal. Bus. & Prof. Code § 17200. “Each of these three adjectives captures a separate and

distinct theory of liability.” Rubio v. Capital One Bank, 613 F.3d 1195, 1203 (9th Cir. 2010) (quotation marks omitted). Section 17200 “borrows” violations of other laws and treats them as unlawful practices independently actionable under section 17200. Id. Counterclaimants’ UCL claim is based on the “acts of shipping improperly⁷ and acts to interfere with Phix Doctor business relationships with false statements and bad faith threats” (Dkt. No. 102, Am. Counterclaim ¶ 70.) These allegations are based on § 2 of the Sherman Act and the RICO causes of action.

Since the Court granted Counterdefendants’ motion to dismiss as to the Sherman Act, and wire/mail fraud, and RICO causes of action, the Court also GRANTS their motion to dismiss on the unfair business practices pursuant to California Business & Professions Code section 17200.

G. Remaining Causes of Action

Counterclaimants move to dismiss on the remaining causes of action for (6), (7) intentional interference with contractual relations under California and Florida law; (8) intentional interference with prospective economic relations under California and Florida law; (9) negligent interference with prospective economic advantage under California and Florida law; (10) defamation under Florida law; (11) fraud under Florida law; and (12) deceptive and unfair practices act under Florida law. In their opposition, Counterclaimants failed to oppose counterdefendants’ motion to dismiss based on these causes of action.

Their failure to respond to the arguments raised by counterclaimants on these claims constitutes an abandonment of these claims and dismissal is appropriate. Jenkins v. County of Riverside, 398 F.3d 1093, 1095 n. 4 (9th Cir. 2005) (plaintiff “abandoned her other two claims by not raising them in opposition to the County’s motion for summary judgment”); see also Walsh v. Nev. Dep’t of Human Resources, 471 F.3d 1033, 1037 (9th Cir. 2006) (where opposition to motion to dismiss failed to

⁷Alleged improper shipping labels appear to relate to the antitrust cause of action.

1 address arguments in motion to dismiss, the plaintiff failed to demonstrate a continuing
 2 interest in pursuing a claim for relief and it was “effectively abandoned” and could not
 3 be raised on appeal.); In re TFT-LCD (Flat Panel) Antitrust Litigation, 586 F. Supp. 2d
 4 1109, 1131 (N.D. Cal. 2008). Accordingly, the Court GRANTS counterdefendants’
 5 motion to dismiss the causes of action for intentional interference with contractual
 6 relations, intentional interference with prospective economic relations, negligent
 7 interference with prospective economic advantage, defamation, fraud, and deceptive and
 8 unfair practices act under Florida law.

9 **H. Leave to Amend or Futility of Amendment**

10 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless
 11 the court determines that the allegation of other facts consistent with the challenged
 12 pleading could not possibly cure the deficiency.’” DeSoto, 957 F.2d at 658 (quoting
 13 Schreiber Distrib. Co., 806 F.2d at 1401. In other words, where leave to amend would
 14 be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber,
 15 806 F.2d at 1401. The Court must determine whether a second chance for leave to
 16 amend should be granted on the RICO causes of action.

17 In the Court’s prior order, it provided Counterclaimants leave to amend the
 18 complaint to correct the deficiencies in their allegations which they failed to correct in
 19 the amended counterclaim. Instead, Counterclaimants added ten additional causes of
 20 action in the counterclaim. This required Counterdefendants to file a brief on each of
 21 these causes of action in their motion to dismiss, and in opposition, Counterclaimants
 22 fail to oppose. This has caused undue delay and prejudice to the opposing party and a
 23 waste of judicial resources. See SissetonWahpeton Sioux Tribe v. United States, 90
 24 F.3d 351, 355 (9th Cir.1996) (the Court’s discretion to deny or grant leave to amend is
 25 particularly broad where Plaintiff has previously been permitted to amend his complaint
 26 and court looks at five factors in determining whether denial of leave to amend was an
 27 abuse of discretion).

28 Where Plaintiff was previously given leave to amend to correct the deficiencies

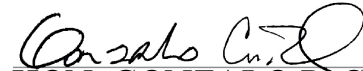
1 in the amended counterclaims previously identified by the Court and failed to do so, the
2 Court can conclude that further leave to amend would be futile. See Barkett v. Sentosa
3 Props., LLC, No. 14cv1698-LJO-JLT, 2015 WL 3756348, at *8 (E.D. Cal. June 16,
4 2015). Therefore, the Court concludes that leave to amend the RICO causes of action
5 would be futile and the Court DENIES Counterclaimants leave to amend.

6 **Conclusion**

7 Based on the above, the Court GRANTS Counterdefendants' motion to dismiss
8 the counterclaim without leave to amend. The hearing set for June 26, 2015 shall be
9 **vacated.**

10 IT IS SO ORDERED.

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12 DATED: June 23, 2015

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14 HON. GONZALO P. CURIEL
15 United States District Judge
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